

SPECIALIZED PROCEEDINGS BEFORE IMMIGRATION JUDGES

New Immigration Judge Training, January, 2018

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U.S. Immigration Judge
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(b) (6)

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CREDIBLE FEAR REVIEW

Sources of authority:

- 8 U.S.C. § 235(b)(1)(B)(iii)(II).
- 8 C.F.R. §§ 208.30, 1003.42, 1208.30(g) (2015).
- Immigration Court Practice Manual (ICPM) ¶ 7.4(d)(iv).
- Interim Operating Policy and Procedure Memorandum (OPPM) 97-3:
Procedures for Credible Fear and Claimed Status Reviews.
- Note that neither the OPPM nor the ICPM were published pursuant to the rulemaking provisions of the Administrative Procedures Act.
 - The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

Applicability:

- Applicants for admission or stowaways found inadmissible by DHS and administratively ordered removed (expedited removal) pursuant to INA §§ 235(b)(1) and 235(a)(2), respectively. 8 C.F.R. § 208.30(a).
- DHS Asylum Officer found no credible fear of persecution or torture.
 - Not a “*significant possibility*, taking into account the credibility of the statements made by alien of the alien’s claim and such other facts as are known to the officer, the alien can establish eligibility for asylum . . or for withholding of removal.” 8 C.F.R. § 208.30(e)(2) (emphasis added); DHS *Lafferty Memo*, Feb 28, 2014.
- Alien requested Immigration Judge review (or refused to make an election). 8 C.F.R. § 208.30(g)(1).

Initiation of Proceedings:

- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863, with the administrative “written record.”
 - the report of Asylum Officer’s interview including a summary of the material facts as stated by the applicant and the Officer’s analysis,

- additional facts and other materials (if any) relied upon by the Asylum Officer,

- the Officer's interview notes, and

- the *Notice and Order of Expedited Removal*, Form I-860.

• 8 U.S.C. § 235(b)(1)(B)(iii)(II); 8 C.F.R. §§ 1003.42(a), 1208.30(g)(2)(ii); OPPM 97-3, p. 6.

Proceedings:

• 8 C.F.R. § 1003.12, *et seq* Immigration Court procedures are specifically inapplicable: "The sole procedures for review of credible fear determinations by IJs are provided for in 1003.42." 8 C.F.R. § 1003.12.

• IJ "shall determine whether the review shall be in person, or through telephonic or video connection." 8 C.F.R. § 1003.42(c).

• Closed to the public unless the alien consents on the record or in writing. 8 C.F.R. § 1208.30(g)(2)(iii).

• Hearing is recorded. ICPM ¶ 7.4(d)(iv)(E).

• "A credible fear review is simply a review of the DHS asylum officer's decision." ICPM ¶ 7.4(d)(iv)(E). "Credible fear review proceedings should not be as in depth as a full asylum hearing." OPPM 97-3, p. 9.

Representation:

• DHS representation – regulation is silent.

• Alien representation: "Alien may consult with a person or persons of the alien's choosing prior to review." 8 C.F.R. § 1003.42(c).

- "In the discretion of the IJ, persons consulted may be present during the credible fear review. However, the alien is not represented at the credible fear review. Accordingly, persons acting on the alien's behalf are not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments." ICPM ¶ 7.4(d)(iv)(C).

Standard of review:

• 8 C.F.R. § 1003.42(d)

• *De novo* – Immigration Judge is not bound by determination of Asylum Officer.

- Considering credibility of alien's statements in support of claim.
- Is there a "*significant possibility*" that the alien could establish eligibility for asylum or withholding? 8 C.F.R. § 1003.42(d) (emphasis added)
 - "Lower than the "well-founded fear" standard needed to receive asylum [and] intended to separate meritorious claims from clearly non-meritorious claims." H.R. Rep. 104-879, 107 (Jan. 2, 1997).

Evidence:

- The administrative "written record" from DHS. 8 U.S.C. § 235(b)(1)(B)(iii)(II); 8 C.F.R. §§ 1003.42(a), 1208.30(g)(2)(ii); OPPM 97-3, p. 6.
- Additionally, the Immigration Judge "*may receive*" any oral or written statement that is material and relevant to an issue in the review. 8 C.F.R. § 1003.42(c) (emphasis added).
 - Receipt of evidence is in the discretion of the Immigration Judge. ICPM ¶ 7.4(d)(iv)(E).
- Testimony of the alien shall be under oath or affirmation administered by the Immigration Judge. 8 C.F.R. § 1003.42(c).
- The immigration judge takes "into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge." 8 C.F.R. § 1003.42(d).

Completion standard:

- The Immigration Judge "shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days" after the Supervisory Asylum Officer approves the Asylum Officer's negative determination. 8 C.F.R. § 1003.42(e).

Decision:

- If the Immigration Judge finds credible fear, vacate Asylum Officer's determination – DHS files Notice to Appear. 8 C.F.R. § 1208.30(g)(2)(iv)(B).
- If the Immigration Judge finds no credible fear, affirm Asylum Officer's determination & remand to DHS for execution of administrative removal order. 8 C.F.R. § 1208.30(g)(2)(iv)(A).

- “The [DHS], however, may reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge.” *Id.*

- USCIS takes the position that it has inherent authority to reconsider any of its decisions, but that there is no right to seek reconsideration of a negative credible fear finding.

• There is no right to appeal the Immigration Judge’s decision to the BIA – it is administratively final. *Id.*

REASONABLE FEAR REVIEW

Sources of authority:

- Not mentioned in the INA
- 8 C.F.R. §§ 208.31, 1208.31.
- Immigration Court Practice Manual (ICPM) ¶ 7.4(e)(iv).
 - Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.
 - The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

Applicability:

- Aliens administratively ordered removed pursuant to INA § 238(b) (non-LPR aggravated felons) or whose prior order is being reinstated pursuant to INA § 241(a)(5). 8 C.F.R. § 208.31(a); 1208.31(a).
- DHS found no reasonable fear of persecution or torture.
 - Not a “*reasonable possibility* that he or she would be persecuted . . . or tortured in the country of removal.” 8 C.F.R. §§ 208.31(c), 1208.31(c).
- Alien requested Immigration Judge review. 8 C.F.R. §§ 208.31(f), 1208.31(f).

Initiation of Proceedings:

- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863, with the administrative “record of determination:”
 - the report of Asylum Officer’s interview, including a summary of the material facts,
 - other materials upon which the determination was based, and
 - the Officer’s notes.
- 8 C.F.R. § 1208.31(g); ICPM ¶ 7.4(e)(iv)(D).

Proceedings:

- Unlike Credible Fear Reviews, 8 C.F.R. § 1208.31 provides no special procedural rules for Reasonable Fear Reviews.
- “Except where specifically stated, the rules in this subpart apply to matters before Immigration Judges, including, but not limited to . . .” 8 C.F.R. Part 1003, Subpart C, Immigration Court – Rules of Procedures, 8 C.F. R. § 1003.12.
 - In short, in the absence of other specifically applicable procedural rules, the same rules of procedure applicable to INA § 240 removal proceedings apply to Reasonable Fear Reviews (e.g.; representation (§ 1003.16), appearances (§ 1003.17), and continuances (§ 1003.29)).
- The hearing is recorded. ICPM ¶ 7.4(e)(iv)(E).
- “A reasonable fear review hearing is not as comprehensive or in-depth as a withholding of removal hearing in removal proceedings. Rather, it is a review of the DHS asylum officer’s decision.” – ICPM ¶ 7.4(e)(iv)(E).

Representation:

- DHS may be represented. 8 C.F.R. § 1003.16(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).
 - Note that ICPM ¶ 7.4(e)(iv)(C) provides that alien representation is “subject to the immigration judge’s discretion.”

Standard of review:

- Does the alien have a “reasonable fear” of persecution or torture? 8 C.F.R. § 1208.31(g).
 - “The “reasonable fear” screening standard is the same standard of proof used in asylum eligibility determinations. That is, the alien must show that there is a “*reasonable possibility*” that he or she would be persecuted or tortured in the country of removal.” 64 Fed. Reg. 8485 (emphasis added).
 - Higher than the “significant possibility” standard applicable to credible fear review, reflecting the “significantly higher” “likelihood” standard of proof for withholding of removal applications as compared to the “well-founded fear” standard for asylum. *Id.*

- The bars to Withholding of Removal are not considered. ICPM ¶ 7.4(e)(i).

- 8 C.F.R. Part 1003, Subpart C is silent.

Evidence:

- The administrative “record of determination” from DHS. 8 C.F.R. § 1208.31(g).
- Other “evidence may be introduced at the discretion of the Immigration Judge.” ICPM ¶ 7.4(e)(iv)(E).

- Note that 8 C.F.R. § 1208.31 is silent regarding the submission of evidence beyond the administrative “record of determination.”

- Testimony of witnesses to be under oath or affirmation. 8 C.F.R. § 1003.34.

Completion standard:

- The review shall be conducted by the Immigration Judge “within 10 days of the filing” of the Notice of Referral. 8 C.F.R. § 1208.31(g).

- Note that although the ICPM refers to “*statutory* time limits,” reasonable fear reviews are a creation of regulation. ICPM ¶ 7.4(e)(iv)(E) (emphasis added).

Decision:

- If the Immigration Judge finds no reasonable fear, return to DHS for execution of administrative removal order. 8 C.F.R. § 1208.31(g)(1).

- Provide a brief rationale for your concurrence with the Asylum Officer on the order, i.e.; “no protected ground / no government nexus.”

- No right to appeal the Immigration Judge’s reasonable fear decision to the BIA – it is administratively final. 8 C.F.R. § 1208.31(g)(1)(iv)(A).

- If the Immigration Judge finds reasonable fear, the alien may apply for Withholding of Removal (the alien is ineligible for Asylum). 8 C.F.R. § 1208.31(g)(2).

- INA § 241(b)(3) and 8 C.F.R. § 1208.16(d)(2) grounds for mandatory denial apply.

- The Applicant has the right to appeal an adverse decision on an application for Withholding of Removal to the BIA. 8 C.F.R. § 1208.31(g)(2)(ii).

- Regulation silent regarding DHS reconsideration of Asylum Officer's decision.

- USCIS takes the position that it has inherent authority to reconsider any of its decisions, but that there is no right to seek reconsideration of a negative reasonable fear finding.

• There is no right to appeal the Immigration Judge's decision to the BIA – the decision is administratively final. *Id.*

- However, at least one Circuit Court of Appeal is accepting Petitions for Review and finding jurisdiction to review an IJ's adverse reasonable fear review. *See, e.g; Marisol-Ayala v. Sessions*, No. 13-72250 (9th Cir. 2017) (IJ abused his discretion in finding no reasonable fear where a protected ground – membership in a particular social group; “family ties” – was “a reason” for extortion); *Andrade-Garcia v. Lynch*, 820 F.3d 1076 (9th Cir. 2016) (IJ's negative reasonable fear finding supported by “substantial evidence”).

- The 9th Circuit has faulted as incorrect an IJ's advisal that there is no right to appeal because an alien can petition the 9th Circuit for review of an adverse reasonable fear review, and that such a petition is, “in the normal parlance,” an appeal. *Marisol-Ayala v. Sessions*, No. 13-72250 (9th Cir. 2017).

WITHHOLDING-ONLY PROCEEDINGS

Sources of authority:

- INA §§ 241(b)(3).
- 8 C.F.R. §§ 1208.2(c)(2); 1208.3; 1208.31(g)(2).
- Immigration Court Practice Manual (ICPM) ¶ 7.4(h).

- Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.

- The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

Applicability:

- Aliens subject to a reinstated removal order pursuant to INA § 241(a)(5) where an Asylum Officer or Immigration Judge has found a reasonable fear of persecution or torture. 8 C.F.R. §§ 1208.2(c)(2)(i); 1208.31(g)(2).
- Aliens administratively ordered removed pursuant to INA § 238 for having been convicted of an aggravated felony, and where an Asylum Officer has found a reasonable fear of persecution or torture. 8 C.F.R. § 1208.2(c)(2)(ii).

Initiation of Proceedings:

- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863. 8 C.F.R. § 1208.2(c)(2).

Proceedings:

- “The scope of review . . . shall be limited to a determination of whether the alien is eligible for *withholding* or *deferral* of removal.” 8 C.F.R. § 1208.2(c)(3)(i) (emphasis added).
- Withholding-only proceedings are “conducted in accordance with the same rules of procedure as proceedings conducted under 8 C.F.R. part 1240, subpart A,” except that “all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.” 8 C.F.R. § 1208.2(c)(3)(i).

Representation:

- DHS may be represented. 8 C.F.R. § 1003.16(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).

Standard of review:

- The same burdens of proof regarding an application for withholding of removal applicable in removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.8(d).

Evidence:

- The same evidentiary rules applicable to removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.7.

Completion standard:

- None

Decision:

- The parties have the same right to appeal as in removal proceedings. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.15.

ASYLUM-ONLY PROCEEDINGS

Sources of authority:

- INA §§ 208, 241(b)(3).
- 8 C.F.R. §§ 1208.2(c)(1); 1208.5(b)(1)(ii); 1208.30(g)(2)(iv)(C); 1235.8.
- Immigration Court Practice Manual (ICPM) ¶ 7.4(g).

- Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.

- The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

Applicability:

- Stowaways found to have a credible fear of persecution or torture by an immigration officer or Immigration Judge. 8 C.F.R. §§ 1208.2(c)(1)(ii); 1208.30(g)(2)(iv)(C).
- Crewmembers (D Visa applicants) who express a fear of persecution or torture to an immigration officer. 8 C.F.R. §§ 1208.2(c)(1)(i), 1208.5(b)(1)(ii).
- Visa Waiver Program (VWP) applicants for admission and overstays who have expressed a fear of persecution or torture to an immigration officer, or who apply for asylum with DHS. 8 C.F.R. §§ 1208.2(c)(1)(iii); 1208.2(c)(1)(iv).
- Aliens who have applied for or have been admitted with an S Visa who have expressed a fear of persecution or torture to an immigration officer, or who applies for asylum with DHS. 8 C.F.R. § 1208.2(c)(1)(iv).
- Aliens administratively ordered removed by DHS pursuant to INA § 235(c)(1) on security and related grounds, and referred to an Immigration Judge by the DHS regional director. 8 C.F.R. §§ 1208.2(c)(1)(v), 1235.8.

Initiation of Proceedings:

- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863. 8 C.F.R. § 1208.2(c)(1).

Proceedings:

- “The scope of review . . . shall be limited to a determination of whether the alien is eligible for *asylum* or *withholding* or *deferral* of removal, and whether asylum shall be granted in the exercise of discretion.” 8 C.F.R. § 1208.2(c)(3)(i) (emphasis added).

- Asylum-only proceedings are “conducted in accordance with the same rules of procedure as proceedings conducted under 8 C.F.R. part 1240, subpart A,” except that “all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.” 8 C.F.R. § 1208.2(c)(3)(i).

Representation:

- DHS may be represented. 8 C.F.R. § 1003.16(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).

Standard of review:

- The same burdens of proof regarding applications for asylum or withholding of removal applicable in removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.8(d).

Evidence:

- The same evidentiary rules applicable to removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.7.

Completion standard:

- None

Decision:

- There parties have the same right to appeal as in removal proceedings. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.15.

CLAIMED STATUS REVIEW

Sources of authority:

- INA § 235(b)(1)(C).
- 8 C.F.R. § 1235.3(b)(5)(iv).
- Interim Operating Policy and Procedure Memorandum (OPPM) 97-3:
Procedures for Credible Fear and Claimed Status Reviews.
- Immigration Court Practice Manual (ICPM) ¶ 7.4(f).
 - Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.
 - The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

Applicability:

- Aliens found inadmissible by DHS and administratively ordered removed (expedited removal) pursuant to INA § 235(b)(1)(A)(i) who claims to be a United States citizen, to have been lawfully admitted for permanent residence, to have been admitted as a refugee, or to have been granted asylum.
- The DHS has been unable to verify the claimed status.
- Alien makes declaration in a written statement under oath under penalty of perjury.
- INA § 235(b)(1)(C); 8 C.F.R. § 1235.3(b)(5)(i); OPPM 97-3, p. 4; ICPM ¶ 7.4(f).

Initiation of Proceedings:

- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863, with the alien's sworn statement claiming status as a United States citizen, to having been lawfully admitted as a permanent resident or refugee, or to having been granted asylum.

Proceedings:

- Unlike Credible Fear Reviews, 8 C.F.R. § 1235.3 provides no special procedural rules for Claimed Status Reviews.

- “Except where specifically stated, the rules in this subpart apply to matters before Immigration Judges, including, but not limited to . . .” 8 C.F.R. Part 1003, Subpart C, Immigration Court – Rules of Procedures, 8 C.F. R. § 1003.12.

- In short, in the absence of other specifically applicable procedural rules, the same rules of procedures applicable to INA § 240 removal proceedings apply to Claimed Status Reviews (e.g.; representation (§ 1003.16), appearances (§ 1003.17), and continuances (§ 1003.29)).

- The hearing is recorded. ICPM ¶ 7.4(f)(v).

- “Though the claimed status review is limited in nature, claims to status, particularly claims to United States citizenship, can be complicated and may require extensive evidence. Therefore, the Immigration Judge has the discretion to continue proceedings to allow DHS and the person making the claim to collect and submit evidence.” ICPM ¶ 7.4(f)(v).

Representation:

- DHS may be represented. 8 C.F.R. § 1003.16(a).

- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).

- Note that ICPM ¶ 7.4(f)(iii) provides that the alien “may consult with a person or persons of his or her choosing,” and that “in the discretion of the Immigration Judge” the “persons consulted may be present during the claimed status review;” however, “the individual subject to the review is not represented during the review” and the person consulted is “not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments.”

Standard of review:

- The immigration judge “determines” whether the alien has the claimed status. 8 C.F.R. § 1235.3(b)(5)(iv).

- Neither the statute, the regulation, nor the Practice Manual offer any standard of proof.

Evidence:

- “Either party may introduce oral or written statements.” ICPM ¶ 7.4(f)(v).

- Other evidence may be submitted in the discretion of the Immigration Judge. ICPM ¶ 7.4(f)(v).

- Note that both the statute and regulation are silent regarding the submission of evidence.

Completion standard:

- “Although not required by statute or regulation, claimed status review cases (except cases involving claims to United States citizenship) will be heard, to the maximum extent practical, within the same time frame as credible fear review cases (within 24 hours to the extent practicable, but not more than 7 days from the filing of the charging document). OPPM 97-3, p. 4; *accord* ICPM ¶ 7.4(f)(i).

Decision:

- If the claimed status is not verified, “the order issued by the immigration officer will be affirmed and the [DHS] will remove the alien.” 8 C.F.R. § 1235.3(b)(5)(iv).

- If the claimed status is verified, “the Immigration Judge will terminate proceedings and vacate the expedited removal order.” 8 C.F.R. § 1235.3(b)(5)(iv).

- Note that the Order in CASE is that “the decision of the immigration officer is vacated.”

- The DHS may thereafter place the alien (but not a verified United States citizen) in removal proceedings. 8 C.F.R. § 1235.3(b)(5)(iv).

- There is no right to appeal the Immigration Judge’s decision (at least not to the BIA). 8 C.F.R. § 1235.3(b)(5)(iv).

RESCISSION PROCEEDINGS

Sources of authority:

- INA §§ 246(a).
- 8 C.F.R. §§ 1246.1.
- Immigration Court Practice Manual (ICPM) ¶ 7.3.

- Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.

- The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

Applicability:

• Aliens who have adjusted status as a lawful permanent resident within the past 5 years, who have subsequently been determined by DHS to not have been eligible for the adjustment of status, and who contest any allegation in the *Notice of Intent to Rescind* or requests a hearing before an Immigration Judge. 8 C.F.R. § 1246.1.

Initiation of Proceedings:

• Initiated by filing the *Notice of Intent to Rescind* and the respondent's *Answer* which either contests or denies any of the allegations, or requests a hearing before an Immigration Judge. 8 C.F.R. § 1246.1.

• The *Notice* and *Answer* are entered as exhibits in the record. 8 C.F.R. § 1246.5(b).

Proceedings:

• “The immigration judge shall have authority to interrogate, examine, and cross-examine the respondent and other witnesses, to present and receive evidence, to determine whether adjustment of status shall be rescinded, to make decisions thereon, including an appropriate order, and to take any other action consistent with applicable provisions of law and regulations as may be appropriate to the disposition of the case. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges by the Act. ” 8 C.F.R. § 1246.4.

• “The immigration judge shall advise the respondent of the nature of the proceeding and the legal authority under which it is conducted; . . . of his or her right to

representation . . . ; that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf, and to cross-examine witnesses presented by the Government” 8 C.F.R. § 1246.5(b).

- The immigration judge shall “read the allegations in the notice to the respondent and explain them in nontechnical language” *Id.*

- “The immigration shall require the respondent to state for the record whether he or she admits or denies the allegations contained in the notice . . . and whether he or she concedes that his or her adjustment of status should be rescinded.” *Id.*

- “If the respondent admits all of the allegations and concedes that the adjustment of status . . . should be rescinded . . . , and the immigration judge is satisfied that no issues of law or fact remain, he or she may determine that rescission as alleged has been established by the respondent’s admissions.” *Id.*

- “The allegations contained in the notice shall be taken as admitted when the respondent, without reasonable cause, fails or refuses to attend or remain in attendance at the hearing.” *Id.*

Representation:

- DHS shall be represented. 8 C.F.R. § 1246.5(a).

- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. §§ 1240.3; 1246.3; 1246.5(b).

Standard of review:

- “In rescission of adjustment of status, the Government bears the burden of proving ineligibility for adjustment by clear, unequivocal, and convincing evidence.” *Matter of N-M-A-*, 22 I&N Dec. 312, 346 (BIA 1998) (Guendelsberger, J., concurring and dissenting), *citing Waziri v. INS*, 392 F.2d 55 (9th Cir. 1968); *Matter of Suleiman*, 15 I&N Dec. 784 (BIA 1974).

Evidence:

- Both parties have the right to present evidence, including witnesses. 8 C.F.R. §§ 1240.7; 1246.5(a) and (b).

Completion standard:

- None

Decision:

- “The decision of the immigration judge may be oral or written. . . . The order shall direct either that the proceeding be terminated or that the adjustment of status be rescinded.” 8 C.F.R. § 1246.6.
- “The formal enumeration of findings is not required.” *Id.*
- Both parties have the right to appeal the decision to the BIA. 8 C.F.R. § 1246.7

DEPORTATION AND EXCLUSION PROCEEDINGS

Sources of authority:

- Former INA §§ 242B.
- 8 C.F.R. §§ 1240.40, *et seq.*
- Immigration Court Practice Manual (ICPM) ¶ 7.2

- Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.

- The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

Applicability:

- Deportation proceedings relate to aliens in the United States who have violated immigration law.

- Exclusion proceedings relate to aliens who arrive at a port of entry and are not admissible to the United States.

- Generally similar to, but beginning with proceedings commenced on April 1, 1997, have been replaced by removal proceedings. ICPM § 7.2(a).

- However, immigration judges continue to conduct deportation and exclusion proceedings in certain cases that began before April 1, 1997.

Initiation of Proceedings:

- Deportation and Exclusion proceedings are initiated by the filing of an *Order to Show Cause* and a *Notice to Applicant for Admission Detained for Hearing*, respectively.

- In Deportation proceedings, hearing notices must be either personally served on the alien or sent by certified mail, at least 14 days prior to the hearing.

- The *Order to Show Cause* or other notice (including any Form I-261, *Additional Charges of Inadmissibility/Deportability*) must be in English and Spanish. Former INA § 242B(a)(3)(A).

Proceedings:

- The rules of procedure, representation, evidence, appeal, etc. are generally equivalent to those applicable to INA § 240 removal proceedings.
- Exclusion proceedings are closed to the public unless the alien requests that the public be allowed to attend.
- Grounds for deportability are found in former INA § 241.
- Grounds for excludability are found in former INA § 212.

Relief:

- Eligibility for INA § 245 Adjustment of Status, INA § 208 Asylum, INA § 241(b)(3) Withholding of Removal, and relief under the Convention Against Torture are the same as in removal proceedings.
- Aliens in deportation proceedings may be eligible for Suspension of Deportation (similar to Cancellation of Removal in removal proceedings) pursuant to former INA § 244.
- Aliens lawfully admitted for permanent residence may be eligible for waiver pursuant to former INA § 212(c).

APPENDIX

- SAMPLE SCRIPT – CREDIBLE FEAR/REASONABLE FEAR REVIEW PROCEEDINGS
- EXAMPLE IJ ORDERS
 - CREDIBLE FEAR REVIEW
 - REASONABLE FEAR REVIEW
 - CLAIMED STATUS REVIEW
- OPPM 97-3, *Procedures for Credible Fear and Claimed Status Reviews*

SAMPLE SCRIPT – CREDIBLE FEAR REVIEW PROCEEDINGS

This is United States Immigration Judge _____
sitting in Credible Fear Review proceedings at _____ in the
matter of _____. The date is _____.
_____ is appearing pro se and the government is
represented by Assistant Chief Counsel _____/is not
represented.

Mr/Ms _____, good morning/afternoon. Is
_____ the language that you speak and understand the best?
Are you having any difficulty hearing or understanding the interpreter?

These proceedings are called Credible Fear Review proceedings. I'm
going to take a few minutes to explain the nature and purpose of these
proceedings, the limitations of these proceedings, and your rights in these
proceedings, so please be patient with me while I do that, and then I'll ask
how you'd like to proceed.

These proceedings were initiated when the Department of Homeland
Security filed a document with the court called a Notice of Referral to
Immigration Judge. That document tells me several things. It tells me that
that the Department of Homeland Security has found you to be inadmissible
to the United States and has administratively ordered your removal from this
country; that you have expressed a fear that you could be harmed if returned
to your home country; that you have had an interview with an Asylum
Officer as a result of that expression of fear; and that the Asylum Officer has
concluded that you do not have a credible fear of "persecution" or "torture"
as those two terms, "persecution" and "torture," are defined by the

immigration law. Your case has been referred to this court pursuant to your request for an independent review of the decision of the Asylum Officer. In essence, you have appealed the Asylum Officer's decision to this court for review.

Have you understood everything I've explained so far?

In conducting my review I will consider the report of your interview with the Asylum Officer as well as any documents that the Asylum Officer considered in making his or her decision. There are only two decisions available to me: I can either agree with the Asylum Officer, or I can disagree with the Asylum Officer. If I agree with the Asylum Officer, conclude that you do not have a credible fear of "persecution" or "torture," again as those two terms are defined by the immigration law, I will affirm the decision of the Asylum Officer and your case will be returned to the Department of Homeland Security and they will affect your removal from the United States. Conversely, if I disagree with the Asylum Officer, find that you do have a credible fear of "persecution" or "torture," I will vacate these proceedings and you will thereafter be placed in different proceedings that will afford you the opportunity to apply for Asylum or Asylum-like relief in the United States. Regardless of which decision I make, either agreeing with the Asylum Officer or disagreeing with the Asylum Officer, my decision is administratively final.

Have you understood everything I've explained so far?

Before we have your hearing you have the right to consult with a person of your choosing. That could be a friend, a family member, or perhaps an attorney. The officer is handing you a list of attorneys and organizations in this area who may agree to consult with you at a reduced

cost. You're free to contact the individuals on that list or find an attorney from anywhere else you like, but regardless of where you found an attorney with whom to consult, you would have to pay for the consultation. The government will not pay for an attorney consultation for you. You also have the right to have your hearing without consulting with anyone, it's up to you.

Have you understood everything I've explained this morning?

Please stand and raise your right hand to be sworn. Do you solemnly swear that the testimony you'll give in these proceedings will be the truth, the whole truth, and nothing but the truth?

Would you like me to postpone your case for a short time so you can consult with someone before we have your hearing?

I note that you had an interview with an Asylum Officer on _____, is that correct?

I see that the interview was conducted in the _____ language utilizing an interpreter, much as we're doing today, is that correct?

Is everything you told the Asylum Officer during the interview true and correct?

Based on your testimony and my review of your interview with the Asylum Officer I conclude that _____. (If affirming the decision of the Asylum Officer, provide a brief explanation; i.e., the record does not establish persecution based on a protected ground and/or a nexus to government action or inaction.)